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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 1

THE UNITED STATES OF AMERICA, PETITIONER

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

STATEMENT

This case was argued orally to the Court on October 20, 1948. By order of June 13, 1949, the case was restored to the docket for reargument. The purpose of this brief is to supplement the discussion of two propositions:

First, assuming that an owner of land on or adjacent to a non-navigable tributary of the Mississippi River owns a property right to have his land drain into the tributary, he does not have the right, as against the United States, to have the Mississippi remain unimproved so that it will continue to fall to its natural low levels below ordinary high-water mark in order that the waters of

the non-navigable tributary might fall to the same low levels and thus permit drainage of the land.

Second, there is nothing in the record and findings in this case to establish that the respondent owned a property right, as against the United States or anyone else, to have its land drain into a non-navigable tributary of the Mississippi or anywhere else.

SUMMARY OF ARGUMENT

I

A. The court below apparently assumed the physical fact of drainage to be an "incident of ownership" and a property right attaching to the respondent's land. The assumed right of drainage and the Government's right, without liability, to hold the Mississippi River at ordinary high-water mark in aid of navigation cannot stand together. The Government's right must prevail. It is more than a mere property right. It is a constitutionally-delegated sovereign power. *United States* v. *Willow River Co.*, 324 U.S. 499, 510; *United States* v. *Commodore Park*, 324 U.S. 386, 390-391; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-597. In exercising that right, the United States was doing no more than it had a right to do and the resulting loss to the respondent was *damnum absque injuria*.

The damages sustained by the respondent are not different from those suffered without indemnification by a Missouri landowner whose property is

reduced in value as a result of a change in the grade of a public street on which his land abuts. When the Missouri Constitution, like the Fifth Amendment, provided for compensation for property "taken," the owner of the lot abutting on the improved street could not recover. Missouri Constitution, 1865, Article 1, sec. XVI; *The City of St. Louis* v. *Gurno*, 12 Mo. 414, 419-420; *Wegmann* v. *The City of Jefferson*, 61 Mo. 55, 56. After the Missouri Constitution was amended to provide for compensation for property "taken *or damaged*" (emphasis supplied), the owner of the lot abutting the street where the grade was changed could recover (1875 Constitution, Article II, sec. 21); *Sheehy* v. *K. C. Cable Ry. Co.*, 94 Mo. 574, 578-579; *Hickman* v. *The City of Kansas*, 120 Mo. 110, 116-117; but, even then, the owner of the lot a block away from the altered street could not recover. *Kansas City* v. *Brown*, 286 Mo. 1, 21. Under the Fifth Amendment, the respondent is like the pre-1875 Missouri lot owner, and to the extent that its land is non-riparian it is in a position corresponding to that of the post-1875 Missouri lot owner, whose lot was a block away from the street whose grade was changed. Just as the Missouri political unit had a right, without liability, to change the grade of the street even though it resulted in loss to the lot owner, the United States has a right to hold the Mississippi at ordinary high-water mark.

B. There is no merit to the argument that the owner of land riparian to a navigable river buys subject to the Government's servitude as if it were an ordinary "easement" and, therefore, cannot complain when the Government improves the river for navigation, while the non-riparian owner or the owner riparian to a non-navigable tributary does not purchase subject to the "easement" (servitude) and, therefore, is entitled to recover. The "easement" theory is pure fiction. The Government's power to improve the river for navigation has nothing to do with the title to land or with rights reserved as in ordinary conveyancing. It is a sovereign power, derived from the constitutional authority to regulate commerce. *United States* v. *Commodore Park,* 324 U.S. 386, 393; *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 62-63; *Gilman* v. *Philadelphia,* 3 Wall. 713, 724.

If the respondent's concept of the "easement" theory were correct, the United States would be subject to liability on every non-navigable tributary of a navigable river whenever the Government undertook regulation of the river, whether it raised the river or lowered the river, so long as the landowner could prove damage. Furthermore, if the Government were liable to landowners on a non-navigable tributary because the land is not subject to the navigation servitude, it would seem that the same liability would extend to owners of non-riparian land since their title is not qualified by the navigation servitude. This would sharply re-

strict the Government's dominant power, since any riparian owner on the navigable river could put himself in the position of a non-riparian owner by conveying all but the front foot or two of his land contiguous to the river, and then procuring a reconveyance of that land to himself. *Frazier* v. *Shantz Real Estate & Inv. Co.*, 343 Mo. 861, 872; *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331; *Yearsley* v. *Cater*, 149 Wash. 285, 288-289.

II

A. The Court of Claims erroneously assumed that respondent owned a property right to drain, for the record and findings in this case do not establish that such a property right existed. If it did not exist, there was nothing for the Government to "take."

B. If Baldwin Farm was non-riparian, the respondent has no property right to drain. This is true both as to surface and subsurface waters. As to surface water, under Missouri law a landowner may use, occupy or improve his own land as he sees fit, despite the fact that, in so doing, the flow of surface water is changed and causes damage to adjoining land. *Abbott* v. *The K. C., St. J. & C. B. Ry. Co.*, 83 Mo. 271, 286; *Casanover* v. *Villanova Realty Co.*, 209 S.W. 2d 556, 558 (Mo. App.); see *Vollrath* v. *Wabash R. Co.*, 65 F. Supp. 766, 769 (W.D. Mo.); *Applegate* v. *Franklin*, 109 Mo. App. 293; *Johnson* v. *Leazenby*, 202 Mo. App. 232; *Got-*

tenetroeter v. *Kapplemann,* 83 Mo. App. 290; *Mehonray* v. *Foster,* 132 Mo. App. 229; *Goll* v. *Railroad,* 271 Mo. 655; *Collier* v. *The C. & A. Ry. Co.,* 48 Mo. App. 398. The same rule, it would seem, should control "percolating waters" which, it is assumed, the court below referred to as "subsurface waters." See, *Waterworks Co.* v. *Jenkins,* 62 Mo. App. 74, 80; Gould, *Law of Waters* (3d ed. 1900), sec. 280, p. 556; Note (1928) 55 A.L.R. 1390-1394; Note (1937) 109 A.L.R. 397-398.

C. To the extent that Baldwin Farm was riparian, the respondent may have a property right, as against other riparian owners, to drain. However, there is nothing in the record in this case to establish that Baldwin Farm or any part of it was riparian to Dardenne Creek. To be riparian, land must be in contact with the water. *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387, 445; Gould, *Law of Waters* (3d ed. 1900), sec. 148, p. 298. The riparian rights extend to land back from the stream, but this extension is subject to two limitations. First, the entire riparian tract cannot embrace more acreage than that contained in the legal subdivision described in any one patent from the Government. *Lux* v. *Haggin,* 69 Cal. 255, 425; *Crawford Co.* v. *Hathaway,* 67 Neb. 325, 353-356; *McGinley* v. *Platte Valley Public Power and Irrigation District,* 132 Neb. 292, 297-298. Second, any land severed from the riparian tract by convey-

ance loses its riparian character. *Frazier* v. *Shantz Real Estate & Inv. Co.*, 343 Mo. 861, 872; *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331; *Yearsley* v. *Cater*, 149 Wash. 285, 288-289. Even if any of the land in suit is riparian, it seems doubtful that a riparian right would include the right to drain by artificial, rather than by natural means. The surface drainage on Baldwin Farm is by an artificial system of ditches and connecting pipes.

ARGUMENT

I

THE OWNER OF LAND ON OR ADJACENT TO A NON-NAVIGABLE TRIBUTARY OF THE MISSISSIPPI DOES NOT HAVE THE RIGHT, AS AGAINST THE UNITED STATES, TO HAVE THE MISSISSIPPI CONTINUE TO FALL TO ITS NATURAL LOW LEVELS IN ORDER THAT THE WATERS OF THE TRIBUTARY MIGHT FALL TO THE SAME LOW LEVELS AND PERMIT DRAINAGE OF THE LAND

In a state of nature before the Government's navigation dam was constructed, the Mississippi River fell to low levels (elevation 410 or below) for several months at the end of the year and about three months at the beginning of the year. This provided an opportunity for the water to drain naturally from the subsurface and to drain through an artificial drainage system from the surface of Baldwin Farm, the respondent's land (Fdg. 19, R. 31-32; Fdg. 15, R. 29; artificial drainage system shown on Def. Ex. 4 accompanying the record in this case (R. 45)). The drainage, both natural and artificial, was not into the Mississippi direct.

but into Dardenne Creek, a non-navigable tributary (Fdg. 14, R. 28).

After the Government's dam was constructed, the Mississippi was held to ordinary high-water mark (elevation 420.4), and Dardenne Creek was held to the same elevation in the vicinity of Baldwin Farm (Fdgs. 11, 12, R. 27). The Court of Claims found that, as a result, drainage of the water through the artificial surface drainage system has been obstructed and delayed, while the underground drainage of water has been almost entirely shut off (Fdg. 18, R. 31).

The majority of the court below were under the impression that this deprived the respondent of a property right for which it was entitled to compensation. This view is expressed in the opinion as follows (R. 37-38):

> One of the valuable incidents of the plaintiff's ownership, before the dam was built, was that the surface and underground water passed off his land leaving it available for profitable agriculture. That incident has now been impaired, in order to benefit navigation on the Mississippi. It is the kind of an incident of ownership that could have been granted by the plaintiff to the Government or a neighbor, the privilege of holding surface and underground water in the plaintiff's land, to its detriment as agricultural land. Such a grant would have created a burden in rem upon the plaintiff's land, which would have passed to subsequent owners and bound them.

From this language it is apparent that the court below assumed that the respondent owned a property right to drain Baldwin Farm.[1]

A. Treating as Correct the Assumption of the Court of Claims that the Respondent Owned a Property Right to Drain Baldwin Farm, the Loss Suffered by Respondent Was *Damnum Absque Injuria*

The court below made no finding that the respondent owned a property right to drain its land into Dardenne Creek. As shown by the portion of the opinion quoted above, it took that fact for granted. But even if we treat the fact of drainage as a property right, the conclusion reached below is wholly erroneous. At the outset, it should be pointed out that the conclusion of liability is the product of a unilateral treatment of the problem. The court below simply assumed the existence of a property right in respondent and found damage. It went no further. It did not examine into the rights of the United States. But "rights, property or otherwise, which are absolute against all the world are certainly rare." *United States* v. *Willow River Co.*, 324 U. S. 499, 510. Liability cannot properly be predicated on an examination of the rights of the claimant only, as if they were absolute. The rights of both parties must be examined in the light of their relationship to each other. When that is done, it becomes clear that

[1] This assumption is unwarranted. There is nothing in the record or findings to establish that respondent owned such a right (see *infra*, pp. 20-28).

e assumed right to drain into Dardenne Creek
d the Government's servitude for the improve-
nt of navigation cannot stand together. Either
e United States has the right to hold the Missis-
ppi River at ordinary high-water mark without
bility, or, as is implicit in the decision below,
e respondent on a non-navigable tributary, as
incident of ownership, has the right to have the
tural levels of the Mississippi left unaltered.

1. *The right of the United States to improve vigation by holding the Mississippi at ordinary gh-water mark must prevail.*—The right of the nited States to improve navigation by holding e Mississippi at ordinary high-water mark is ore than a mere property right. It is a sover-gn power vested in the Government as an inci-nt of the power to regulate commerce. *United ates* v. *Willow River Co.*, 324 U. S. 499, 510; *nited States* v. *Commodore Park*, 324 U. S. 386, 0-391; *United States* v. *Chicago, M., St. P & R. Co.*, 312 U. S. 592, 596-597. That constitu-nally granted power extends to the entire bed the river below ordinary high-water mark d, in that area, it is the paramount right. that area, private property rights are sub-dinate to the Government's paramount right and st yield when the sovereign sees fit to exercise *United States* v. *Chicago, M., St. P. & P. R. Co.*, 2 U. S. 592, 597. In this case, the United States ed within its paramount power. It remains the

Government's position, set forth in its opening brief (pp. 13-25), that, in stabilizing the Mississippi at ordinary high-water mark, the United States was doing no more than exercising its own servitude over the river to improve it for navigation. Any damage which resulted, whether to land riparian to the navigable river, or to land riparian to the non-navigable tributary, or to non-riparian land, was *damnum absque injuria.*

2. *The parallel drawn in* United States v. Willow River Co., *324 U. S. 499, 510-511, between the riparian owner on a public waterway and the owner of land abutting a public highway, when extended to this case, demonstrates that the respondent's loss is* damnum absque injuria.—The damages sustained by the respondent are not different from those suffered without indemnification by an owner whose property is reduced in value as a result of a change in the grade of a public street on which his property abuts.[2]

When the Missouri Constitution (1865 Constitution, Article 1, sec. XVI), like the Fifth Amendment, provided for just compensation for property "taken", the rule in Missouri was that the owner of a lot, fronting on a street where the grade was changed, could not recover for resulting

[2] As early as 1796, Congress declared "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; * * *." Act of May 18, 1796, c. 29, sec. 9, 1 Stat. 468, and Act of March 3, 1803, c. 27, sec. 17, 2 Stat. 235, R. S. sec. 2476, 43 U.S.C. 931.

damages to his property. *The City of St. Louis* v. *Gurno*, 12 Mo. 414, 419-420; *Wegmann* v. *The City of Jefferson*, 61 Mo. 55, 56. In 1875, the Missouri Constitution (1875 Constitution, Article II, sec. 21) was amended to allow compensation for property "taken *or damaged*" (emphasis supplied). Thereafter, the lot owner was held to be entitled to recover damages. *Sheehy* v. *K. C. Cable Ry. Co.*, 94 Mo. 574; 578-579; *Hickman* v. *The City of Kansas*, 120 Mo. 110, 116-117; see *Blackwell* v. *City of Lee's Summit*, 326 Mo. 491, 496; *Tremayne* v. *City of St. Louis*, 320 Mo. 120, 130-133. Even after the amendment, however, the owner of a lot a block away from the street where the grade was changed could not recover for impairment in value to his property resulting from the change in grade. *Kansas City* v. *Brown*, 286 Mo. 1, 21. Under the Fifth Amendment, the respondent is in no better position than the pre-1875 owner in Missouri whose lot abutted on the altered street. Even if the Fifth Amendment contained the phrase "or damaged," the respondent, so far as its land is non-riparian to Dardenne Creek (see *infra*, pp. 22-28), would be in the same position as the post-1875 Missouri lot owner, whose lot was a block away from the street whose grade was changed.

The rationale of the pre-1875 Missouri cases is that the municipality or other political unit had a right to change the grade of the street even though it resulted in loss to the abutting landowner. Similarly, the United States has a right to stabilize

the Mississippi at ordinary high-water mark. As in the Missouri cases, resulting loss to the landowner is *damnum absque injuria*. In this connection, it is significant that the Missouri courts did not confine their attention to the landowner who claimed damages, but gave heed also to the rights of the entity which improved the street. The majority of the court below, however, gave no consideration whatsoever to the right of the United States to raise the river to ordinary high-water mark. It merely focused its attention on the injury to Baldwin Farm, and from that drew its conclusion of liability (R. 37-38): "* * * but damage alone gives courts no power to require compensation where there is not an actual taking of property." *United States* v. *Willow River Co.*, 324 U .S. 499, 510.

B. The Navigation Servitude Is Not an "Easement" Depending on Land Titles, But Is a Constitutionally Delegated Sovereign Power

The suggestion has been made that the owner of land riparian to a navigable river buys subject to the Government's servitude, and, therefore, cannot complain when the Government improves the river for navigation, whereas the non-riparian owner, or the owner riparian to a non-navigable tributary, does not purchase subject to the servitude and, therefore, is entitled to recover. This theory is predicated on the false premise that the servitude is merely an "easement" which qualifies the title to no land other than that which is riparian

to the Mississippi either at the time the "easement" is exercised or at the time the land is purchased (Resp. Br., pp. 23-24).

1. *The "easement" theory is pure fiction.*—The navigation servitude was not created by express reservations set forth in patents or grants of the land drained by the Mississippi, as might be done in ordinary conveyancing. Nor was it created under a doctrine of case law which read into every such patent or grant an implied reservation of the navigation servitude. That servitude has nothing to do with the title to land nor with rights reserved as in ordinary conveyancing.[3] The source of the navigation servitude is the Constitution, not a reservation, express or implied, in grants and patents. It is derived from the "authority to regulate commerce." *United States* v. *Commodore Park*, 324 U. S. 386, 393. It has its origin in the historical power of the sovereign to control navigable waters, which formerly existed in the English Crown and in the States before the adoption of the Constitution. *Gilman* v. *Philadelphia*, 3 Wall. 713, 724; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62-63; (also see *supra*, p. 10). This understanding of the

[3] This Court has rejected the claim of a riparian owner who asserted rights in a navigable river predicated on ownership of the bed of that river. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. Parenthetically, it might be asked how respondent, none of whose land is riparian to the Mississippi, can have greater rights than the owner of the bed of the Mississippi.

origin of the Government's navigation servitude leaves no room for indulging in the fiction that it is a mere easement.[4]

2. *Adoption of respondent's conception of the "easement" theory would reduce the navigation servitude to insignificance.*—The respondent apparently regards the "easement" (navigation servitude) as qualifying the title of land which was riparian to the Mississippi at the time the private owner purchased it, regardless of whether it was riparian at the time the Government granted the land and reserved the "easement" (Resp. Br., pp. 23-24). This is erroneous since, even under the "easement" theory, the servitude would have been reserved to the Government at the time the patent or grant issued, and any subsequent purchaser of land in the watershed of the Mississippi would take subject to the Government's reserved servitude (see note 4, this page). Under respondent's concept of the "easement" theory, a riparian owner on a

[4] As a matter of fact, if the "easement" theory were correct, the navigation servitude would extend to all the land drained by the Mississippi River, including the land in suit. If a reservation of an "easement" (navigation servitude) in favor of the Government were to be implied, the implication would embrace all land which might be affected by exercise of the "easement," and that would mean all land in the watershed of the Mississippi. Since at one time the Government owned all that land, under the easement theory, every grant or patent impliedly reserved to the United States the "easement" (navigation servitude). Of course, conveyances by private parties subsequent to the patent or grant would not affect the prior "easement" reserved to the United States.

non-navigable tributary, or a non-riparian owner, would not be subject to the "easement" and, therefore, would own the right to have the natural levels of the navigable river left unaltered since title to his land would not be qualified by the "easement" to improve navigation. It is not made clear from what source the owner of land not on the navigable river would derive the right to have the navigable river left at its natural levels. Because Whiteacre is subject to an easement, it does not follow that the owner of Blackacre, adjoining, has a property right to have Whiteacre left free from exercise of the easement.

While the court below did not specifically rely on the fictional "easement" theory, at the same time, it did not state the basis for denying the United States the right to exercise its navigation servitude within the natural bed of the river. However, if, as respondent suggests (Resp. Br., pp. 23-24), the conclusion reached below can be justified on its interpretation of the "easement" theory, then what has been termed the "great and absolute" power to improve the river through exercise of the navigation servitude is reduced to insignificance. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62. On that basis, the Government's right to stabilize the Mississippi at ordinary high-water mark for the improvement of navigation may be exercised without liability only against owners of land which

is riparian to the navigable river at the time of the exercise of the servitude. The holding below, if sustained on the respondent's idea of the "easement" theory, would so sharply restrict the doctrine of a dominant public interest in navigation that, as a practical matter, the navigation servitude would be of little value, since the Government would have to pay for all damage to any property except that riparian to the navigable river.

First, the respondent's theory would subject the United States to liability on every non-navigable tributary of a navigable river every time the Government undertook regulation of the river. Of necessity, by virtue of inexorable principles of hydraulics, the Government, acting in aid of navigation, cannot lower or raise the Mississippi without affecting the levels of the lower stretches of its tributaries. No matter what the Government does by way of improving the navigable river, a landowner riparian to the non-navigable tributary would be obliged only to show damage to recover. Thus, if the Government lowered the level of the navigable river by diverting water, such a landowner could recover for impairment of agricultural value because his land drained faster or to lower levels than formerly. Again, he might recover for damage to his private fish hatchery, or because his land lost its value for duck hunting when the level of the non-navigable tributary was reduced so that

it no longer was possible to pump water from the stream into the fish tanks or onto the land in order to utilize it as a private duck reserve. On the other hand, if the Government raised the level of a navigable river to ordinary high-water mark, recovery could be had for impairment of drainage, for softening of levees, or for loss of head on a mill dam.[5]

Second, if, as the court below held, the Government is to be liable to riparian landowners on a non-navigable tributary, on the theory that their land is not subject to the navigation servitude, why is it not liable for damage to land non-riparian to the navigable river? After all, on respondent's theory, title to that land is not qualified by what the respondent has characterized as "the easement of dominant right of the Government" (Resp. Br., p. 23). Followed to its logical conclusion, this would reduce the Government's "dominant right" to little or nothing. If the fictional "easement" applies only to land riparian at the time the "easement" is exercised or at the time the land is purchased, any riparian owner on the navigable river could put himself in the position of a non-riparian owner. He could rid himself of the overriding navigation servitude by two conveyances—one transferring out all but the first foot or two of land immediately fronting on the river; the second, a

[5] On this point, see the discussion of *United States* v. *Cress*, 243 U. S. 316, in the main brief, pp. 16-17, 20.

conveyance retransferring the same land to himself. Upon completion of this conveyance circuit, the land back of the foot or two fronting on the river no longer would be riparian and, therefore, according to the "easement" theory, no longer would be subject to the navigation servitude. *Frazier* v. *Shantz Real Estate & Inv. Co.*, 343 Mo. 861, 872; *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331; *Yearsley* v. *Cater*, 149 Wash. 285, 288-289; see discussion *infra*, pp. 26-27.

It seems to the United States that, if the holding of the court below is correct, all substance is extracted from the doctrine of a paramount navigation servitude defined and sustained by this Court in *United States* v. *Willow River Co.*, 324 U. S. 499; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, and earlier cases. Landowners, riparian and non-riparian, within the watershed of the non-navigable tributaries of a navigable river, and non-riparian owners within the watershed of the navigable river will be entitled to damages if they can prove loss resulting from the lawful exercise of the dominant servitude in the interests of navigation. And riparian owners on the navigable river could bring themselves into the category of non-riparian owners by divesting their riverfront land of its riparian character through simple conveyances. The Government would be left with a shell of a right which, when exercised, would be

converted into an exercise of the entirely distinct power of eminent domain.

II

THERE IS NOTHING IN THE RECORD AND FINDINGS IN THIS CASE TO ESTABLISH THAT THERE IS A PROPERTY RIGHT AS AGAINST ANYONE TO DRAIN THE LANDS IN SUIT

In its opinion, the Court of Claims spoke of drainage of waters from Baldwin Farm as "an incident of ownership" belonging to respondent and stated that it was this incident which had been impaired by the improvement of navigation on the Mississippi (R. 37-38, quoted *supra*, p. 8). It follows that if the respondent did not own the property right to drain this land, then, even under the reasoning of the court below, there was nothing that the Government could have "taken." Up to this point in the brief, we have treated as correct the assumption of the court below that the respondent owned a property right to drain and have demonstrated that, even so, the respondent has no right as against the Government to have the Mississippi left undisturbed. However, that assumption was erroneous and without support in the record.

A. The Court Below Erroneously Assumed That Respondent Owned a Property Right to Drain

The opinion of the court below (R. 37-38, quoted *supra*, p. 8) assumes, without explanation, that the respondent owned an absolute right to have the

Mississippi River left unaltered, to continue to fall to its natural low levels in order that the waters of Dardenne Creek might fall to the same low levels and thus permit drainage from Baldwin Farm into the creek. The court made a finding concerning the existence of the physical fact of drainage. It found that the natural drainage of Baldwin Farm, for both surface and subsurface waters, was into Dardenne Creek (Fdg. 14, R. 28). But it did not find that the respondent owned a right to drain its land into Dardenne Creek or anywhere else. It simply took for granted that the respondent owned such a right.

Physical facts are not property rights. The sun shines on a garden. It does not follow that the owner has a property right to be free from having a building constructed on the adjoining lot which places the garden in the shade and makes it useless. Similarly, when the Mississippi was at its natural low levels, Baldwin Farm drained partly by natural means and partly by artificial means (Fdg. 19, R. 31-32; Fdg. 15, R. 29). It does not follow that the respondent has a property right to be free from having the Mississippi River stabilized at ordinary high-water mark in the improvement of navigation. The court below indulged in pure assumption when it treated the physical fact of drainage as an "incident of ownership," a property right, for the impairment of which the Government is liable because it changed existing physical conditions by

holding the Mississippi River at ordinary high-water mark.

In making the assumption that drainage was a property right, the Court of Claims did not indicate whether the assumed right was one which attached to all of Baldwin Farm, whether riparian or non-riparian, or, whether it was a property right which attached to riparian land only and that Baldwin Farm was riparian. The record is silent on the point and there is no finding concerning the riparian or non-riparian character of the land.[6]

B. If Baldwin Farm Is Non-Riparian, Respondent Has No Property Right to Drain

If the land in suit is not riparian to Dardenne Creek, the respondent has no property right in Missouri to have the water drain. This is true

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[6] The entire Baldwin Farm, owned by the respondent, contains over 2,500 acres, of which 1,710 acres are in suit (Fdg. 2, R. 21; Fdg. 11, R. 27). Approximately 2,524 acres are described at R. 1-4. None of the land in sections 6, 8, 9 or 17 (1,640 acres) touches Dardenne Creek, and the original patents from the United States, conveying that land, did not include any land abutting the creek (Bureau of Land Management Tract Book, Missouri, St. Louis Series, East #1). Therefore, that land never was and never could be riparian. The remaining 884 acres are in sections 10, 15 and 16. Some of this land may be riparian. The land records of the Department of the Interior (Tract Book, Missouri, St. Louis Series, East #1) reflect that determination of how much is riparian would require an examination of the chain of title to ascertain (1) what part of the land was riparian under the original patents from the State of Missouri as to the school section 16, and that part of section 15 which was embraced in a swamp-land grant to the State; (2) what part was riparian under the original patent from the United States as to section 10 and a portion of section 15, and (3) whether any of the land riparian under the original patents lost its riparian character by virtue of subsequent conveyances.

both as to surface and subsurface waters. Missouri follows the common-law rule respecting "surface waters."[1] *Abbott* v. *The K. C., St. J. & C. B. Ry. Co.*, 83 Mo. 271, 286; *Casanover* v. *Villanova Realty Co.*, 209 S. W. 2d 556, 558 (Mo. App.); see *Vollrath* v. *Wabash R. Co.*, 65 F. Supp. 766, 769 (W.D. Mo.). This means that a landowner is at liberty to make any use whatever of his own property despite the fact that, in so doing, the flow of surface water is changed and causes damage to adjoining land by either increasing or diminishing the quantity of surface water previously on the land. For example, a landowner may drain "surface waters" from his land, though, in so doing, he, at the same time, drains the land of another and destroys its value as a fishery. *Applegate* v. *Franklin*, 109 Mo. App. 293. He may build a dam near the line dividing two farms, thus forcing the water back onto the property of the upper landowner, causing damage. *Johnson* v. *Leazenby*, 202 Mo. App. 232; *Gottenetroeter* v. *Kapplemann*, 83 Mo. App. 290. He may raise the grade of his land to prevent surface water coming upon it even if that results in diverting the water onto his neighbor's

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[1] As used in the law of waters, the term "surface waters" means "Water spread upon the surface of land, or contained in depressions therein, if not flowing in a fixed channel, or not having permanent sources of supply, so as to constitute a watercourse, and not constituting a permanent lake or pond * * *. Waters of that character include such as come from rain and snows." 3 Tiffany, *Real Property* (3d ed. 1939), sec. 740, p. 155. It is also defined to include water "percolating the soil beneath the surface, if flowing in no definite channel * * *." Gould, *Law of Waters* (3d ed. 1900), sec. 263, p. 536.

higher land: *Mchonray* v. *Foster*, 132 Mo. App. 229. A railroad may substitute an earthen embankment for a trestle, or may construct a solid embankment in the first instance, thus causing adjoining land to be flooded by accumulated surface waters which formerly escaped through the trestle, or drained naturally. *Golt* v. *Railroad*, 271 Mo. 655; *Collier* v. *The C. & A. Ry. Co.*, 48 Mo. App. 398.

Subsurface waters, as dealt with in this case, would seem to be governed by the same principles as are applied to "surface waters." See, *Waterworks Co.* v. *Jenkins*, 62 Mo. App. 74, 80; Gould, *Law of Waters* (3d ed. 1900), sec. 280, p. 556.[8] Since Missouri follows the common law rule with respect to surface waters (cases cited at pp. 23-24, *supra*), it would seem that the same rule would be applied to percolating waters. Note (1928) 55 A.L.R. 1390-1394; Note (1937) 109 A.L.R. 397-398.

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[8] Subterranean waters are of two classes: (1) underground streams and (2) percolating waters. The first class flows in known and defined channels. The second class, "percolating waters," are those which ooze, seep or percolate through the earth in unknown or undefined channels. 3 Tiffany, *Real Property* (3d ed. 1939), sec. 748, p. 180; sec. 746, p. 173. In this case, the court below did not find or otherwise indicate into which class it placed the subsurface waters on Baldwin Farm. However, from the tenor of the record it is presumed the subsurface waters were "percolating waters." This is in accord with the general proposition that, in the absence of evidence to the contrary, subterranean water is presumed to be percolating rather than in a defined underground stream. Note (1928) 55 A.L.R. 1386-1388; Note (1937) 109 A.L.R. 397.

Under Missouri law, the loss suffered by a landowner resulting from interference with surface and percolating waters by an adjoining landowner in the lawful exercise of his attributes of ownership is *damnum absque injuria*. The reason is that no property right has been infringed. The damaged landowner does not have a property right to have surface and subsurface waters drain upon adjacent land. Even if the water drained from non-riparian to riparian land and thence into the creek it would not enlarge the property rights in the non-riparian land. Nor does the fact that both non-riparian and riparian land are in one ownership create a property right to drain which attaches to the non-riparian land. Once land becomes non-riparian it can never regain its riparian character. *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331; *Yearsley* v. *Cate*, 149 Wash. 285, 288-289. Note (1908) 11 L.R.A. (N.S.) 1062; 2 Farnham, *Waters and Water Rights*, p. 1572 (1904). Accordingly, so far as Baldwin Farm is non-riparian, there is no validity to the assumption of the court below that drainage is a property right. It follows that respondent could not have been deprived of such a right as to its non-riparian lands.

C. The Record Does Not Show to What Extent, if Any, Baldwin Farm Is Riparian

If any part of Baldwin Farm is riparian to Dardenne Creek, then, as against other riparian

owners, to the extent that the land is riparian, the respondent may have a right to the flow of Dardenne Creek in its natural state. This, we assume, would include the right to have the stream free from an obstruction by another riparian owner which would raise the water and prevent drainage. However, from the record in this case, there is no way of knowing whether Baldwin Farm, or any part of it, is riparian. See *supra,* note 6, p. 22.

To be riparian "land must not only be contiguous to the water, but in contact with it. Proximity without contact is insufficient." *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387, 445; Gould, *Law of Waters* (3d ed. 1900), sec. 148, p. 298. It is true that the riparian rights do not attach merely to the frontage abutting the stream, but extend to land back from the stream. But, as between private riparian owners, who must share the waters of the stream, it does not extend back indefinitely. The area of land which may partake of the riparian benefit is controlled by two limitations. First, the entire riparian tract cannot embrace more acreage than that contained in the legal subdivision described in any one patent from the Government. *Lux* v. *Haggin,* 69 Cal. 255, 425; *Crawford Co.* v. *Hathaway,* 67 Neb. 325, 353-356; *McGinley* v. *Platte Valley Public Power and Irrigation District,* 132 Neb. 292, 297-298. Second, any land severed from the riparian tract by conveyance loses its riparian

character. Thus, if the owner of a riparian tract conveys the portion contiguous to the water, the remainder is cut off from all riparian rights. *Frazier* v. *Shantz Real Estate & Inv. Co.,* 343 Mo. 861, 872. Conversely, when a portion of a riparian tract not contiguous to the water is sold, it loses its riparian character and, as a corollary, subsequent additions to a riparian tract do not enlarge the acreage entitled to riparian rights. *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 331; *Yearsley* v. *Cater,* 149 Wash. 285, 288-289. Note (1908) 11 L.R.A. (N.S.) 1062; 2 Farnham, *Waters and Water Rights,* p. 1572 (1904). As a matter of fact, land severed from a riparian tract can never regain the riparian right even though it be reconveyed so that the riparian and non-riparian land are in a single ownership. *Anaheim Union Water Co.* v. *Fuller, ubi supra.*

In the light of these principles, it becomes immediately apparent that a substantial portion of the land in suit is not riparian (see *supra,* note 6, p. 22) and, as to that land, even under the Court of Claims concept of a "property right" of drainage, the respondent did not own the right to drain into Dardenne Creek and, therefore, could not have been deprived of such a right.

Even as to any portion of the land in suit which might be found to be riparian, it seems doubtful that the riparian right would include the right to

drain by artificial rather than natural means. On the Baldwin Farm, surface drainage was by an artificial system of ditches and connecting pipes (Fdg. 15, R. 29; see Def. Ex. 4, accompanying the record in this case (R. 45)). The court below, however, made no distinction between natural and artificial drainage.

CONCLUSION

In this brief we have supplemented the discussion contained in our main brief, demonstrating that, even if the Court of Claims was correct in its assumption that the respondent had a property right to drain, the loss resulting from stabilizing the Mississippi River at ordinary high-water mark in the improvement of navigation was *damnum absque injuria,* since the United States was doing no more than it had a right to do. In addition, we have examined the validity of the assumption of a right to drain and have pointed out that if Baldwin Farm was non-riparian the respondent had no property right whatsoever to drain. To the extent that Baldwin Farm was riparian, the respondent may have had a right, as against fellow riparian owners, but not the United States, to have Dardenne Creek free of obstructions which would prevent drainage. However, the record in this case is silent on the issue of fact as to whether Baldwin Farm, or any part of it, is riparian.

For the reasons set forth in the Government's

briefs, the judgment below should be reversed, with instructions to dismiss the petition.

Respectfully submitted,

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